FILE COPY

(28,522)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 146

(October Term, 1924, No. 925)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE

HERMAN L. EKERN,
Attorney General,

FRANKLIN E. BUMP,
Assistant Attorney General,
Counsel for defendants in error.

SUBJECT INDEX

Page

Introductory statement 1

Question and state's position stated—

Single question is: May a state for the purpose of making effective its inheritance taxation policies and law, constitutionally classify all gifts made within a reasonable fixed period before death as gifts made in contemplation of death, irrespective of the actual fact?
Affirmative answer contended for 2-3

Argument

Classification for purposes of inheritance tax of all gifts made within reasonable time before donor's death as gifts made in contemplation of death is administrative necessity, and has such substantial relation to object of taxing statute that it is reasonably founded in purposes and policies of taxation, and does not contravene the 14th Amendment 3-15

(1) Inducement for and object of statute: administrative necessity 5-10

(a) Ebeling case 5
(b) Tax Commission's recommendation 8
(c) Uihlein case 9

(2) Rebuttable presumption ineffectual 10

(a) Rule in other states 11
(b) Evolution of enforcement provisions 12

(3) Statute founded in purposes and policies of taxation 13

(4) 14th Amendment not violated 13

(a) Does not take property without compensation 13
(b) All persons within the class treated alike 14

(5) Classification does not change character of tax, which remains excise tax 14

Appendix—Text of statute involved 16

TABLE OF CASES CITED

Page

Dane v. Jackson, 256 U. S. 589, 599 14

Ebeling, Estate of, 169 Wis. 432, 434-437 ..... 5, 9

Hatch v. Reardon, 204 U. S. 152, 159 3

Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283..... 14

Royster Guano v. Virginia, 253 U. S. 412 14

Schlesinger Estate, In re, 184 Wis. 1-10 ..... 1, 4

Stebbins v. Riley, 267 U. S. —; 69 L. ed. 456; 45 Sup Ct. Rep. 424 ..... 4, 14, 15

Uihlein's Will, In re, 203 N.W. 742 9

Watson v. Comptroller, 254 U. S. 122 13

TEXT BOOKS CITED

Gleason and Otis on Inheritance Taxation, 3d ed. 12

Gleason and Otis on Inheritance Taxation, 4th ed., 971-1336... 11

McElroy on The Law of Taxable Transfers, 2 ed., 109 11

Ruling Case Law Suppl. Vol. 3, p. 1460 9

STATUTE CITED

Sec. 72.01, Wisconsin Statutes 2

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 146

(October Term, 1924, No. 556)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE

INTRODUCTORY STATEMENT.

The case is on writ of error to review a judgment of the Supreme Court of the State of Wisconsin dated May 6, 1924 (R. 42), officially reported in Vol. 184, Wisconsin Supreme

Court Reports, at pp. 1 to 10, inclusive, holding valid the provision of the Wisconsin inheritance tax law enacted in 1913 declaring that "every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without any adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of" the law imposing a tax on the transfer of property made in contemplation of the death of the grantor, vendor or donor (Wis. Stats. 72.01) and sustaining a tax on the transfer by gift of property made within such six year period but not made in actual contemplation of death.

The provision of the Wisconsin statute above quoted was assailed in the court below, and the judgment of the Wisconsin Supreme Court is attacked here, by plaintiffs in error as being in contravention of the Fourteenth Amendment to the Constitution of the United States, sec. 1, on the ground that it deprives them and the recipients of such gifts of their property without due process of law and that it denies to them the equal protection of the laws.

The relevant parts of the statute involved are quoted on page 2 of the brief of the plaintiffs in error, and, are also set out in an appendix to this brief.

SINGLE QUESTION INVOLVED, AND THE STATE'S POSITION, STATED.

In the last analysis, the single question presented by the case is,

May a state, in the exercise of its sovereign and undoubted power to tax the right to receive property from a decedent, say, on grounds of public policy, and for the purposes of classification for the practical administration of its inheritance tax law, that all gifts made within a certain reasonable period (here six years)—although some be made not in actual contemplation of death—shall, for taxation purposes, be construed (or declared) to fall within the class of gifts made in contemplation of death taxed by the law, without

violating the due process of law and equal protection of the laws clauses of the Federal Constitution?

The state contends that the correct answer is in the affirmative, as given by the Wisconsin Supreme Court by the judgment below.

ARGUMENT.

THE CLASSIFICATION FOR THE PURPOSES OF THE INHERITANCE TAX OF ALL GIFTS MADE WITHIN A REASONABLE TIME BEFORE THE DONOR'S DEATH AS GIFTS MADE IN CONTEMPLATION OF DEATH IS AN ADMINISTRATIVE NECESSITY, AND HAS SUCH A SUBSTANTIAL RELATION TO THE OBJECT OF THE TAXING STATUTE THAT IT IS REASONABLY FOUNDED IN THE PURPOSES AND POLICIES OF TAXATION, AND IS THEREFORE VALID; AND THE IMPOSITION OF TAXES ACCORDINGLY NEITHER TAKES PROPERTY WITHOUT DUE PROCESS OF LAW NOR DENIES THE EQUAL PROTECTION OF THE LAWS TO THE RECIPIENTS OF SUCH GIFTS.

It is not claimed that the state is without constitutional power to place gifts of property *inter vivos* made in contemplation of death in the same class with transfers of property by will or descent for the purposes of inheritance taxation. Neither is the power of the state to tax all transfers *inter vivos* denied. The power of the legislature to impose an excise tax upon the recipient of all transfers of property *inter vivos*, made with or without adequate valuable consideration, and whether made in contemplation of death or otherwise, must be conceded—it cannot be successfully challenged.

Hatch v. *Reardon*, 204 U. S. 152, 159.

What is claimed is, that the classification of all gifts *inter vivos* made within a fixed period of the death of the donor as gifts made in contemplation of death irrespective of the actual fact is arbitrary, capricious and unreasonable; and that the taxation of the right to receive gifts within the period so fixed which were not made in

actual contemplation of death, while not taxing like gifts made without the period, constitutes the taking of the property of plaintiffs in error without due process of law, and denies to them the equal protection of the law.

Many pages of argument and citations of and quotations from the books are given by plaintiffs in error in their brief to sustain this contention, which they divide into parts I, II and III; but the argument as a whole, and in its several parts, not wholly, but practically ignores the one outstanding and controlling consideration, that the purpose of the classification made by the statute is an administrative necessity, grounded in public policy, which, *when* considered, as clearly pointed out in the opinion of the state court (R. 42, 44-47; 184 Wis. 1, 6-10), makes the classification reasonable and valid as "having a fair and substantial relation to the object of the legislation," which, it is settled by many decisions of this court, is a sufficient basis for a classification for taxation purposes. As is said in one of the latest of such decisions, in which the former cases are referred to and commented upon, "It is not necessary that the basis of the classification should be deducible from the nature of the thing classified. *It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.'*" (Italics ours.)

> *Stebbins* v. *Riley*, 267 U. S. ——; 69 L. ed. 456; 45 S. Ct. Rep. 424.

The classification here questioned was clearly made, as we shall show, in the exercise of legislative judgment and discretion, for the legitimate purpose of preventing a common and effective method (adopted particularly by men of wealth) of evasion of the inheritance taxes imposed upon the recipients of transfers of property by will or descent; and the fact that that classification results in the discrimination complained of between gifts made within the six year period and those made without that period, is no objection to the classification when viewed in the light of the object and purpose of the legislature in making it.

> *Stebbins* v. *Riley*, *supra*.

The argument of plaintiffs in error might and probably would be held to be sound were we dealing with a general tax upon transfers of property *inter vivos* as such. But that is not the kind of tax nor a classification for the purposes of such a tax that is involved. We therefore deem it unnecessary to reply to that argument *in extenso;* it is, we think, effectively answered by the settled rule above stated, and by Chief Justice Vinje, speaking for the court below, in the opinion printed in the Record (pp. 42-47)—substantially all of which is also printed in the brief on the other side, and need not be repeated in ours—and by Justice Owen for the same court in the opinion in the prior case of the *Estate of Ebeling*, the material part of which we shall presently quote in full.

We may accept for the most part the statements of the general principles governing the classification of persons and things for legislative purposes contained in the brief for plaintiffs in error without at all endangering the contention that the classification involved here is reasonably founded in the purposes and policies of the inheritance taxation laws of the state, and that the judgment of the court below is therefore right.

THE BACKGROUND OF INDUCEMENT FOR AND THE OBJECT AND PURPOSE OF THE QUESTIONED ENACTMENT.

The inducement for and the object and purpose of the amendment to the inheritance tax law involved here is well stated in the case of *Estate of Ebeling*, 169 Wis. 432, 434-437, as follows:

> "The state contends that the amendment makes every gift of a material part of the estate of a deceased person, when made within six years prior to death, subject to an inheritance tax. It is the contention of the respondents that the amendment does not have such conclusive effect, and that it accomplishes no more than to make the gift, when made within six years prior to death, *prima facie* evidence of the fact that it was made in contemplation of death, thereby shifting the burden of proof upon that question.

"In the case of *State* v. *Thompson*, 154 Wis. 320, 142 N. W. 647, this court had under consideration the question of inheritance taxes due from the estate of one Joseph Dessert, who died at the age of ninety-two. Practically his entire estate was devised to his only daughter and sole heir, Stella D. Thompson. She took by the will about $200,000. During the last six years of his life he gave her approximately a half million dollars, mainly in two gifts, one made three years and the other four and one-half years prior to his death. This court held that the gifts were not subject to inheritance taxes. *The circumstances of that case forcibly brought to the attention of the legislature the fact that after a person had attained the age of eighty-nine years, an age when he could not expect to live many more years, when his thoughts, naturally, were consumed rather with the disposition of property already accumulated than with the accumulation of more, he could bestow his property upon the objects of his bounty and thus evade the inheritance tax.* This decision was rendered May 31, 1913. The legislature was then in session. Ten days thereafter Senate bill No. 575 was introduced by the Joint Committee on Finance. This bill, without amendment, was approved July 21st and became ch. 643, Laws 1913. [This is the enactment attacked by plaintiffs in error.]

"Now the question is this: Did the legislature intend to make gifts and transfers of property, made within six years prior to death, absolutely taxable, or was it simply providing a rule of evidence? There can be little doubt that the legislation was prompted by the decision in the *Thompson Case*. That was a case in which the state was a party. It was regarded as an important case, not only because of the amount involved but as a precedent. The contention of the state was rejected by the court. It seems quite reasonable to suppose that the legislature in enacting the amendment intended to do what it could in the way of moulding into law the doctrine contended for by the state in that case. *If it intended to make the gift or transfer occurring within six years prior to death only prima facie evidence of the fact that it was made in contemplation of death, the legislative response was certainly weak and puerile.* In cases where the facts are easily ascertainable the burden of proof is of the merest advantage. It is only in cases where the proof is difficult to obtain, such as violations of the excise laws, where a rule of law constituting certain evidence a *prima facie* case is

of real advantage. *With such a construction the amendment would not have changed the result of the Thompson Case, and we may well believe that the purpose of the legislature was to prevent such a recurrence.*

"It is clear to our minds that the legislature intended to define what should constitute a transfer in contemplation of death. *It was the legislative purpose to make the statute effective.* It realized that if a person after reaching the age of eighty or ninety years could dispose of his property free from the tax, it could be easily evaded by those possessing the larger fortunes. So it was enacted not only that the tax should apply to gifts made in contemplation of death but also to gifts made within six years prior to death.

"It is said that the legislature cannot declare a gift to be in contemplation of death when it in fact is not so. It is admitted, however, that the legislature may tax gifts *inter vivos.* Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts *inter vivos,* they are not beyond the power of the legislature to tax. If they be considered gifts *inter vivos* there is abundant justification for the classification here made in segregating them from other gifts *inter vivos* as objects of taxation the basis for such classification being the purpose to make the law taxing gifts made in contemplation of death effective. It is recognized that in enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves a subject of police regulation where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective. *Pennell* v. *State,* 141 Wis. 35, 123 N. W. 115. While a principle relating to police regulation does not necessarily apply to the power of taxation, no reason is perceived why the legislature may not, as here, make a classification of gifts *inter vivos* and subject them to taxation for the purpose of making effective taxation of gifts *causa mortis.* That it will occasionally result in the taxation of gifts not in fact made in contemplation of death, which may be conceded, should not condemn the classification if the classification be reasonably necessary to carry out the legislative scheme for the taxation of gifts *causa mortis.* Nor should it be condemned because there is no material distinction between those who fall immediately upon one side of the

line and those who fall immediately upon the other, as illustrated by the fact that a gift one day less than six years prior to death is taxable, while a gift made one day more than six years prior to death is not taxable. That is always the case where the classification is of necessity fixed by an arbitrary line of demarcation. As said in *State* v. *Evans*, 130 Wis. 381, 110 N. W. 241:

> 'Neither need we be disturbed by the fact that the line of demaraction between the classes is arbitrary. Wherever there is a sliding scale of age, population, demension, distance, or other characteristic which is believed to justify classification, necessarily the division between classes must be arbitrary, and legislation is not to be declared void which adopts the age of twenty-one as marking the right to vote or manage property because the individual at twenty years and eleven months may be as competent as at twenty-one, nor, in a law distinguishing by population, because no appreciable difference can be conceived between the town of 999 and the town of 1,000, provided, generally, the class of those under twenty-one years of age are less competent to vote or manage property than the class of mankind above that age, or the class of towns which do not include villages of 1,000 population are generally less in need of the governmental powers conferred upon villages than the class of towns which do contain villages of 1,000 and upward.'"
> (Italics are ours.)

In connection with the history of the legislation as given by the state supreme court in the foregoing quotation, it may be noted also that the Wisconsin Tax Commission, (which is charged with the duty of administering the inheritance tax law) in its official biennial report to the governor and the legislature of the state, under date of December 3, 1912, and laid before the legislature of 1913, which enacted the statute in question, made several recommendations for amendments to the law based upon its experience with the difficulties of enforcement, among which, was the following:

> "3. Providing more definitely for the taxation of transfers made in the form of gifts, grants, and donations when such transfers are in the nature of a final disposition or distribution of

the estate of the donor or of a material part thereof. The general purpose of the law is to impose a tax upon the passing of estates from the ancestor to his successors. At present large estates or large portions of an estate may be, and frequently are, conveyed during the latter years of the owner's life to his children, in a manner that is clearly testamentary in its nature, yet that cannot readily be proved to have been made either in contemplation of death nor to evade the tax. The law should be made as broad in its language as it is in its purpose."

Referring to the precise statute involved in this case and the decision in the *Ebling* case, quoted from at length above, it is said in 3 R. C. L. Suppl. 1460:

> "A statute imposing a tax on all gifts made within six years of the death of decedent is constitutional. The legislature might tax all gifts *inter vivos*, and there is abundant ground for classifying gifts *inter vivos* in this way, *the purpose being to make the law taxing gifts in contemplation of death effective.*"

The Wisconsin court again had this statute before it in the case of *In re Uihlein's Will* (not yet officially reported) 203 N. W. 742, in which, in addition to the grounds of attack here urged, it was further assailed on the ground that the period of six years fixed by the law is unreasonable. But the statute was upheld for the third time, the court saying:

> "The counsel for appellants claim that our statute, conclusively presuming that gifts made within six years of the testator's death are made in contemplation of death, is unconstitutional; but they frankly state they do not desire to offer any argument on the questions that were settled in the cases of *In Re Estate of Ebling*, 169 Wis. 432, and *In Re Estate of Schlesinger*, 184 Wis. 1, in addition to the arguments presented in those cases but desire to urge that the period fixed, namely six years, is an unreasonably long period, and for that reason the statute is unconstitutional, as well as for the reasons urged in the former cases. *As stated in the Schlesinger case the statute was enacted for the purpose of enabling the taxing officials of the state to make an efficient and practical administration of the inheritance tax law.* If the legislature had the right to make a conclusive

presumption it was undoubtedly within the legislative field to determine the period within which such conclusion should be considered absolute. Unless the period of six years is so excessive and unreasonable that it can be said that it was beyond the legislative field courts cannot interfere. In our judgment the legislature did not pass beyond its field in fixing upon the period of six years. Common experience and observation show that many men of advancing years begin to make a testamentary disposition of their estate in the way of gifts and that such action may continue over quite a number of years. At any rate it was for the legislature to determine the length of the period and we cannot say judicially that it is so long as to be unreasonable." (Italics ours.)

A REBUTTABLE PRESUMPTION WOULD BE INEFFECTUAL.

Plaintiffs in error seem to concede that if the statute created a rebuttable presumption, it would be justified and valid, but ask, "Wherein was the necessity for a conclusive presumption?" (p. 23). Our answer is that a rebuttable presumption would be ineffectual to accomplish the object of the statute, namely, that of enforcing the purposes and policies of taxation.

It is true that the federal estate tax law and the succession and inheritance tax laws of several of the states, in the attempt to prevent evasion of the tax, establish merely a presumption that transfers made without consideration during a limited period before death *"prima facie,"* or "unless the contrary be known," are made in contemplation of death. But such a rebuttable presumption, it was soon found, really amounts to nothing ineffectuating the tax designed to be imposed upon *all* transfers in the nature of testamentary disposition of property, because all of the evidence on the issue is in the possession of the personal representatives or the beneficiaries of the decedent, and none of it is likely to be available to the taxing officials. Experience has shown that the practical advantage of creating a rebuttable presumption, merely, has been almost *nil*, for under such a presumption the estate or beneficiaries are only required to prove a negative, which

everyone knows requires very little evidence to support. The *rebuttable presumption leaves the door of opportunity for evasion of the tax practically as wide open as it is without any presumption at all.* Under such a presumption it is perfectly easy for the ingenious man (and it does not take much ingenuity either) who is bent on evading the tax for the benefit of his estate and the recipients of his bounty to conceal his state of mind and his knowledge of bodily infirmity, or fears of such, which move him to consider the question of the disposition of his property among his kin, from the world, and by studied acts and conduct at or about the time that he gives away his property while still alive, create or leave sufficient evidence to enable his estate to prove the negative and so rebut the presumption.

And so, with common knowledge of the successful evasion of the tax before them, the legislatures of a number of the states besides Wisconsin have determined that it is necessary to the enforcement of their inheritance or succession tax laws to put all gifts made within a certain determined period (varying from two to six years) before death in the class of those made in contemplation of death, and to declare that all gifts made within such period shall be so deemed or construed. The following are some of these states, the references being to the pages of Gleason and Otis on Inheritance Taxation (4th Ed. 1925), where the text of the provisions of the state statutes may be found:

Arizona, six years, p. 971; Arkansas, three years, p. 989; Kentucky, three years, p. 1088; Mississippi, two years, p. 1150; Missouri, two years, p. 1158; North Carolina, three years, p. 1216; North Dakota, six years, p. 1224; South Carolina, five years, p. 1290; Tennessee, two years, p. 1308; West Virginia, three years, p. 1336.

Judge McElroy, in his valuable work on "The Law of Taxable Transfers" (2d Ed.) at page 109, said:

> "A provision in the statutes fixing a definite time prior to death, within which gifts would be deemed 'made in contemplation of death,' would settle all contentions in respect to gifts of

> this kind, but as yet the wisdom, or even the necessity, of such a provision has not received the consideration of the legislature."

This was written in 1909. Since then experience in the administration of the inheritance tax has forced upon the attention of legislature after legislature both the necessity and the wisdom of writing such a provision into the tax law. Since the publication of the 3d edition of Gleason and Otis in 1922, at least five states have written the provision into their law, namely, Arizona, Arkansas, Kentucky, Mississippi and North Carolina.

We believe that it is perfectly obvious that without this means of enforcement, the state is powerless to prevent the successful evasion of the taxes intended to be imposed, and that the provisions for the taxation of transfers made before death but which are in the nature of testamentary disposition of property may as well, for all practical purposes, be written off the statute books.

The average citizen has a peculiar complex, and little conscience, with reference to his obligation to contribute to the maintenance of his government, public works, and institutions by the payment of taxes. The greater his means, with the resulting greater ability to pay, the stronger seems to be his opposition. He gets infinitely more in return for what he pays out, in the way of protection, safety, comfort, health and pleasure and happiness, than from any other expenditures he makes for his business, his home or his family; yet immediately on the passage of a taxation measure, he proceeds, with the help of the best legal talent he can obtain, to devise ways and means to evade the obligations imposed upon him by it, and legislative bodies and administrative officers, and the courts as well, are kept busy in the attempt to checkmate his schemes of evasion: witness the elaborate provisions of the laws and the rules and regulations under them in the taxing machinery of both the federal and state governments. The development of the inheritance (transfer, succession or estate) tax, which is recognized as a particularly just form of taxation which falls only on those best able to pay, is comparatively speaking, very recent. At first all that was provided for was a

tax on the devolution of property by will or descent, but evasions were so easy that it shortly had to be extended to gifts of property to take effect at or after death, and then to gifts presently made in contemplation of death. But this mere extension of the subjects of the tax was found not to be of very great aid in the enforcement, and the rebuttable presumption that a gift made within a fixed period before death was in contemplation of such death was added. This, too, has proven ineffective, and the latest development is the provision of the law involved in this case. Legislatures meet infrequently and act slowly in meeting the problems which the successful evasion of taxation produces, and the constitutionality of every legislative attempt to solve such problems is vigorously assailed in the courts. Otherwise, doubtless many other states would long ere this have enacted an enforcement provision similar to the one we have under consideration.

STATUTE FOUNDED IN THE PURPOSES AND POLICIES OF TAXATION.

We think it appears clearly enough that the classification which the statute makes is so substantially related to the object of the taxing law that it must be upheld by this court, as it was by the state court, as reasonably founded in the state's purposes and policies of taxation.

Watson v. *Comptroller*, 254 U. S. 122.

On page 26 of their brief, plaintiffs in error say that "there is no rule of public policy in the state of Wisconsin against the making of gifts, *generally speaking*." Granted! But it does not follow that there is no question of public policy or state policy involved in the question before the court, as they also claim. The state's *policy of taxation* is the very thing that is before the court.

FOURTEENTH AMENDMENT NOT VIOLATED.

Plaintiffs in error do not complain of the *amount* of the tax imposed, but only of the imposition of any tax at all. There is there-

fore no taking of property without due process of law. This court has said in *Dane* v. *Jackson*, 256 U. S. 589, 599:

> "Where, as here, conflict with Federal power is not involved, a state tax law will be held to conflict with the 14th Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefits received, as to amount to the arbitrary taking of property without compensation,—'to spoilation under the guise of exerting the power of taxing.' 134 U. S. 237; 173 U. S. 615; 239 U. S. 220, *supra*. For other inequalities of burden or other abuses of the state's power of taxation, the only security of the citizen must be found in the structure of our government itself".

and this statement was referred to in the late case of *Stebbins* v. *Riley*, 267 U. S. ——, *supra*, where Mr. Justice Stone said:

> "It has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property."

except under the conditions referred to in *Dane* v. *Jackson*.

Nor, if the classification for the purposes of taxation made by the statute is germane to the purpose and policies of the taxing law, can there be any ground for the claim of plaintiffs in error that they are denied the equal protection of the laws, because all persons coming within the class are treated with exact equality. Quoting again from *Stebbins* v. *Riley*, 267 U. S. ——, *supra*:

> "The taxing statute may, therefore, make a classification for fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation."

citing *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283 and *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412.

Then, too, it seems too plain to require argument that the fundamental nature of the excise tax imposed by the law is not changed

by the classification so as to make it a property tax and subject to the rule of uniformity of taxation. The tax imposed upon those coming within the class is still a tax upon the right to receive property, and not upon the property itself, nor even upon the right to dispose of property, although if it were the latter, it would still remain an excise tax.

Stebbins v. *Riley*, 267 U. S. ——, *supra*.

CONCLUSION.

It is respectfully submitted that the judgment of the Wisconsin Supreme Court should be affirmed.

HERMAN L. EKERN,
Attorney General.

FRANKLIN E. BUMP,
Assistant Attorney General,
Counsel for defendants in error.

APPENDIX.

(Ch. 44, sec. 1, Laws of Wisconsin for 1903 as amended by ch. 643, Laws of Wisconsin for 1913.)

Section 72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town, or municipal purposes, and corporations of this state organized under its laws, or voluntary associations, organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

(1) By a resident of state. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

(2) Nonresident's property within state. * * *

(3) In contemplation of death. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section.

(4) When imposed. * * *

(5) Transfer under power of appointment. * * *

(6) Joint estates. * * *

(7) Insurance part of estate. * * *

(8) On clear market value. * * *